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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1982

No. A-350

STATE OF MISSOURI

Respondent,

v.

PATRICK E. TRIMBLE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Whether or not a judgment of death is excessive and disproportionate and therefore violative of the Fifth, Eighth and Fourteenth Amendments where the jury's verdict specifically sets out as the aggravating circumstance, on which its assessments of a sentence of death is based, matters not pled, charged or proved by the state and outside of the aggravating circumstances contained in Missouri's Statutory requirments for imposition of the death penalty, Section 565.012.2 (1-10) RSMo. 1979?

2. Whether or not the judgment of death is excessive and disproportionate and therefore violative of the Fifth, Eighth, and Fourteenth Amendments when it is imposed soley as a result of finding of Defendant's status as a person lawfully confined and whether or not said aggravating circumstance is overbroad and overinclusive as to deprive Petitioner herein of Due Process of Law under the Fifth and Fourteenth Amendments?

3. Whether or not the introduction into evidence by the State of Defendant's charges on which he was held at the time of the alleged crime, and which are unconnected to said crime, at trial and at the penalty phase of his trial, violates his right not to incriminate himself and his right to Due Process of Law guaranteed by the Fifth and Fourteenth Amendments when the aggravating circumstance charged by the state and submitted to the jury does not require jury to find, determine or consider whether Defendant has been convicted of or is guilty of any specific other crimes?

4. Whether or not the Notice of Aggravation provided Defendant by the State prior to trial denied him Due Process of Law guaranteed by the Fifth and Fourteenth Amendments when said Notice merely set forth the aggravating circumstance in statutory language and provides no evidence to be relied on by the State, or names and addresses of witnesses who would prove same;

and whether said Notice, provided a mere thirty prior to trial, deprived counsel of sufficient particulars and or time to enable him to prepare a defense in the penalty phase?

5. Whether or not the judgment of death is excessive and disproportionate and therefore violative of the Fifth, Eighth and Fourteenth Amendments where the prosecutor was allowed to state to the jury the range of punishment contrary to Section 565.006 RSMo., 1978, which states that the jury should consider the guilt or innocence of a Defendant charged with Capital Murder without having any consideration of the range of punishment in that phase of the trial?

TABLE OF CONTENTS

Questions Presented..... 1

Opinions Below..... 5

Jurisdiction..... 6

Constitutional Provisions and Statutes Involved..... 7

Statement of the Case..... 9

Reasons for Granting the Writ..... 12

Conclusion..... 21

Appendices

A. Missouri Supreme Court opinion below..... A-1

Motion for Re-Hearing and Order Overruling Motion for Re-Hearing..... A-22

B. Pertinent Missouri Statutes..... B-1

TABLE OF AUTHORITIES

Cases:	Pages:
Barclay v. Florida, USSC No. 81-6909.....	12,15
Furman v. Georgia, 408 U.S. 238 (1972).....	13,15
Gardner v. State, 430 U.S. 349 (1977).....	17
Godfrey v. Georgia, 446 U.S. 420 (1980).....	14,15,16,20
Gregg v. Georgia, 428 U.S. 153 (1976).....	14,18
Lockett v. Ohio, 438 U.S. 586 (1978).....	17,20
Presnell v. Florida, 439 U.S. 14 (1978).....	17,18
State v. Trimble, ___ S.W.2d ___, No. 62523, August 31, 1982.....	5,6,14

Constitutional Provisions:

United States Constitution,	
Fifth Amendment.....	16,14,20
Eighth Amendment.....	16,19,20
Fourteenth Amendment.....	16,19,20

Statutes:

Ga. Code § 27-2534.1(b) (7) (1978).....	14
Section 565.006 RSMo 1977.....	18
Section 565.012 RSMo 1977.....	12,18

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PETITION FOR CERTIORARI

Petitioner, Patrick E. Trimble, respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, affirming his conviction of the crime of Capital Murder in Missouri Court and the resultant sentence of death.

OPINION BELOW

The opinion of the Supreme Court of Missouri is styled and numbered as follows:

State of Missouri, Respondent, V. Patrick E. Trimble, Appellant, No. 62523, _____ S.W. 2D _____, (Mo. Banc 1982). A copy of the opinion is reprinted as Petitioner's Appendix A.

JURISDICTIONAL STATMENT

The opinion of the Supreme Court of Missouri in State of Missouri v. Patrick E. Trimble, No. 62523, was filed August 31, 1982. The opinion affirmed Petitioner's state conviction of Capital Murder. On October 7, 1982, the Missouri Supreme Court overruled Petitioner's Motion for Re-Hearing. The order overruling the Motion is included in Appendix A directly after the opinion below this cause.

The present Petition is filed within sixty days after the entry of the above final judgment of the highest Court in Missouri in the above case, and this Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or the militia, when in active service in the time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

United States Constitution, Sixth Amendment reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Eighth Amendment reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

United States Constitution, Fourteenth Amendment reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or poverty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 565.001, RSMo 1977; 565.006, RSMo 1977; 565.008, RSMo 1977; 565.012, RSMo 1977; 565.014, RSMo 1977; and 565.016, RSMo 1977, are set forth in Appendix B.

STATEMENT OF THE CASE

Petitioner, Patrick E. Trimble was convicted in the Circuit Court of Cass County, Missouri of the crime Capital Murder, under Sections 565.001, and 565.006 RSMo. The jury assessed his punishment at death and the trial judge imposed the death penalty as his sentence pursuant to the jury's verdict.

Petitioner was charged by the State in the death of a fellow inmate which occured November 12, 1979 in the St. Charles County, Missouri jail. Both Petitioner and the deceased were in jail awaiting trial on other charges.

The Missouri Capital Murder statutes require that in charges of Capital Murder there be a bifurcated trial in which the jury during its first deliberation decides only the question of guilt or innocense without any consideration of punishment. 565.012 RSMo.

Thereafter, there is a second phase in which both the State and Defendant present evidence in aggravation or mitigation of the crime. The jury is required to find beyond a resonable doubt one of a number of aggravating circumstances before it is authorized to impose a sentence of death.

The aggravating circumstances prosecution can request the jury be instructed to consider are specifically set out in the statutes 565.012 (2) RSMo.

Under the Missouri Rules, the State was required to inform the Defense by a Notice of Aggravation of any aggravating circumstances it proposed to submit to the jury. In this case, a Notice of Aggravation was presented to the Defense thirty days prior to trial, and said Notice set out in statutory language the circumstances which it would propose be presented to the jury for their consideration. No Notice of any evidence which the State would offer to support the submission of the aggravating circumstances or witnesses it expected to call in the penalty phase were identified in the Notice.

During the trial of Petitioner below the State attempted to prove two theories as to his motive for the murder. The State produced as witnesses other inmates who testified that Petitioner stated that he intended to commit a murder while in jail to avoid going to the penintentiary with a conviction for the rape of a child, the charge on which he was held at the time of the murder of which he was charged herein.

The states second theory was that Peitioner committed the murder to cover up other crimes committed against the victim, namely that he had been brutalized by Petitioner while both were inmates at the jail.

Over defense objections raised at trial, in the Motion for New Trial, and in the Appellate Court, the prosecution was allowed to present evidence of the charges on which Petitioner was held. Defense objections were based on the fact that while possibly relevant to motive such evidence was unduly prejudicial and the State had sufficient means by which to prove its case in the absence thereof.

During its closing arguments the attorney for the State, in addition to continuing to argue the other crimes on which Petitioner was held, stated to the jury the full range of punishment allowed for a verdict of Capital Murder. The prosecutor stated that the only punishments authorized for Capital Murder are death or 50 years imprisonment without probation or parole, and stated the possible ranges of punishment for the lesser included offenses on which the jury was instructed. The Missouri Capital Murder statute provides that in the first phase of a Capital Murder trial,"the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment....." Objection to the argument was timely raised by Petitioner in hi Motion for a New Trial, considered and rejected by the Missouri Supreme Court.

The jury was instructed on two aggravating circumstances in the penalty phase of the Petitioner's trial, namely: (1) that the death of Jerry Everett was caused by Petitioner for the purpose of avoiding lawful arrest or prosecution on any additional charges; and (2) that he was in the lawful custody of a place of confinement. The jury, following its deliberations returned their verdict assessing the punishment at death in the following form:

> "We, the jury, having found the defendant Patrick E. Trimble guilty of the capital mur- of Jerry James Everett, fix the Defendandt's punishment at death, and we designate the following aggravating circumstances which we find beyond a reasonable doubt: That at the time of the murder of Jerry James Everett the defendant was in the lawful custody of a place of confinement and as a deterrent to future acts of violents"(sic).

The jury rejected the first aggravating circumstance on which it was instructed and combined with the second a rational of its own not authorized by the Missouri Statute.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that a Writ of Certiorari should issue to the Supreme Court of Missouri because the Missouri Supreme Court's holding below that a sentence of death can be imposed when a jury has specifically grounded its assessment of the sentence of death on a non statutory aggravating circumstance, conflicts with the Petitoner's rights to Due Process and Equal Protection of the law under the Fifth and Fourteenth Amendments to the Constitution and subjects him to an arbitrary and capricious sentence of death constituting cruel and unusual punisnment under the Eighth Amendment.

It is submitted that to allow a jury to combine an aggravating circumstance set out in a sentencing statute with an additional aggravating circumstance of its own devise, which has not been authorized by the legislatute, denies a defendant's right under the Fifth and Fourteenth Amendment to Due Process of Law in subjecting him to a sentence which is arbitrary and capricious, and as such violative of the Eighth Amendment's prohibition against cruel and unusual punishments.

This Case is a perfect companion to that of Barclay v. Florida, U.S.S.C. No. 81-6909 in which this Court on November 8, 1982 granted Certiorari.

In Barclay v. State of Florida, supra, a state prisoner is challenging his sentence of death imposed by a judge after the jury recommended a sentence of life imprisonment. The State Court judge in Barclay based the death penalty on both non statutory aggravating circumstances which were set forth in a presentence investigation and the fact that a co-defendant whose involvement in the crime was not greater that Barclay had been given a sentence of death. The question set forth in Barclay's Petition which is now before the Court is; if a judge or jury considering whether to impose a sentence of death or life impri-

sonment takes non-statutory aggravating circumstances in account, must the resultant death sentence be invalidated?

This case is close enough to Barclay that the result therein may well be determinative. It does, however, present enough differences that the Court should consider it as well.

In this case as opposed to Barclay, it was the jury and not the judge who specified in its verdict form, and contrary to the Missouri Law as instructed by the trial judge, that it was basing the sentence of death on the non-aggravating circumstance "to deter future act of violents".(SIC). That factor was added by the jury in its verdict form to the statutory aggravating circumstance that the homicide took place while Petitioner was in a place of confinement.

In this case it is highly possible that the jury not only found a non-aggravating circumstance, but imposed a sentence of death based on a factor having nothing to do with the particular defendant. We do not know whether the jury meant that it wished to deter anyone who might be inclined to commit a homicide in the future, or, whether it was referring to this particular defendant and imposing the death penalty to prevent him from committing a future violent crime. Neither of those factors is an aggravating circumstance with authorizes the imposition of the death penalty under the Missouri Statute. 565.012 RSMo. In the light of their statement on the verdict, we cannot be certain that a jury would have found the circumstances such as to justify the death penalty due to the homicide having taken place in a place of confinement alone. We will never know the amount of influence the unauthorized factor had in their assessment of punishment.

Following the finding by this Court that the death penalty in numerous States and had been imposed in an arbitrary and capricious manner in Furman V. Georgia, 408. U.S. 238.(1972), the numerous states enacted death penalty statutes in which the penalty of death was not authorized in every homicide, but limited to a narrow number of circumstances in which the homicide

was committed in such a manner as to constitute an aggravating circumstance.

In later cases, this Court has required that the aggravating circumstance be found by the jury beyond a reasonable doubt prior to the imposition of the sentence of death. Gregg v. Georgia, 428 U.S. 153 (1976).

In Godfrey v. Georgia, 446 U.S. 420, (1980), this Court held that the application of an aggravating circumstance must be quite narrow to justify the death penalty. In the Godfrey case the question was whether the homicide "was outrageously of wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind. or an aggravated battery to the victim." Ga. Code Section 27-2534.1(b) (7) (1978). This Court held that even though the jury found the aggravating circumstance beyond a reasonable doubt, the judgment of death could not be affirmed until it had independently assessed the evidence of record and determined upon such evidence that it supported the trial judge's or jury's finding of an aggravating circumstance. Although, Godfrey had stalked and murdered his wife and mother-in-law, it was held that the facts did not comprise the aggravating circumstance as it must be so narrowly construed as to only include those crimes where the victim had been tortured or subjected to an aggravated battery prior to death.

In this case we have a situation in which the jury, to an even larger estent than in Godfrey, roamed beyond the aggravating circumstance authorized by the statute. The jury herein specifically stated in its verdict that an additional factor, not authorized by statute was determinative.

The Missouri Supreme Court in its opinion upholding Petitioner's conviction held that the statutory aggravating circumstance is "only a threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence." State of Missouri v. Patrick E. Trimble,

No. 62523, August 31, 1982. To hold as the Missouri Court that the aggravating circumstance is only a threshold would allow the jury, once it is found, to impose a sentence of death based on race, poverty, political unpopularity or any number of clearly impermissable, arbitrary and capricious factors having nothing to do with the particular offender or crime involved, and would be a giant step backwards to the pre Furman days.

As stated by this Court in Godfrey, a sentence of death in only properly imposed in strict compliance with the statute. Where the statute is not strictly complied with, the sentence is invalid and must be overturned. It is clear from this Court's grant of certiorari in Barclay, supra, that it is concerned with the extent to which a sentencing judge or jury can roam beyond the aggravating factors set out in the statute. Clearly this is a case in which the states are in need of and could benefit from this Court's guidance to clarify a situation that is not an isolated problem. The instant case presents an opportunity for the role of extraneous, non-statutory factors in capital sentencing to be clearly defined and limited, so that defendants in capital cases are treated evenhandedly.

There are additional questions which merit the Court's grant of certiorari herein. It is submitted that in cases such as this the death penalty violates the Eighth Amendment where it is imposed based solely on a person's status as an inmate.

The jury below rejected the other statutory aggravating circumstance and combined an additional factor of deterence in its verdict. The aggravating circumstance upon which the sentence below was based would not justify the death penalty under the facts of this case.

Ostensibly, the aggravating circumstance of a homicide committed while in lawful confinement was to prevent

the death or injury of guards who might be attacked in an inmate's attempted escape, or to prevent a crime by an inmate already under a life or lengthy sentence.

Neither of those factors was present below, but rather, Petitioner and his alleged victim were both in a county jail awaiting trial on unrelated charges. Neither was under a sentence of any kind at the time.

There was no submission to Petitioner's jury of a circumstance of his crime being unusually wanton, vile or involving torture or depravity of mind. Rather, it is only his status as an inmate at the time of his crime which allows him to be under a capital sentence.

As in Godfrey v. Georgia, supra, this Court should exercize its supervisory powers to define whether a death sentence, based soley on the aggravating circumstance and facts below, complies with Constitutional requirements of equal protection and freedom from cruel and unusual punishment.

Thirdly, the Missouri Supreme Court's opinion erred in allowing the Petitioner's conviction to stand where the prosecutor, over defense objections throughout trial and in the appellate court, was allowed to present evidence that Petitioner at the time of the homicide below was under separate charges of rape and kidnapping. That knowledge prejudiced Petitioner in the minds of the jury and injected inflamatory and irrelevant material in violation of Petitioner's right to Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States, and renders his sentence of death invalid under the Eighth Amendment.

The prosecuting attorney in his opening statement told the juty that he would produce evidence that Petitioner, prior to the killing, told other prisoners that he was going to commit a capital murder in order to escape going to the penitentiary for the crives of rape and kidnapping of little girls, the charges upon which Petitioner was awaiting trial

at the time. The prosecutor continued to emphasize the other crimes in the testimony of witnesses, particularly three who were allowed to testify over a defense objection that Petitioner had made such statements to them while they were in the jail. The other charges were also raised in the prosecutors closing argument and gratuitously injected in his cross examination of Petitioner contrary to Missouri law. The rationale for doing so was to prove motive, of which there was sufficient other evidence.

Lockett v. Ohio, 438 U.S. 586 (1978) recognized that due to the finality of the death penalty, questions which might otherwise be resolved in favor of the state, must be resolved in favor of a defendant and where such prejudice is possible, a conviction cannot stand.

This Court recognized in Presnell v. Georgia, 439 U.S. 14 (1978) that a death sentence based on underlying charges on which Defendant had not been tried or convicted could not stand. That case was slightly different in that the Presnell court used the prior charges as a specific basis for the death penalty. The principal should be applied in any case in which an individual faces death at the hands of the state. Where evidence of other, unconnected crimes is paraded before the jury and likely to influence them, a conviction in the light of such evidence is violative of Due Process. As stated in Gardner v. Florida, 430 U.S. 349 (1977), it is vital that any sentence of death be based on reason and not caprice or emotion.

In this case we cannot be certain that the evidence did not arouse caprice and emotion to a very large extent. That is particularly the case in the light of the jury's verdict which stated that the death penalty was to be imposed because Petitioner committed the crime while in lawful custody and, in

the jury's words, "to deter future acts of violents".(sic) It is certainly possible that the jury was referring to deterring Petitioner from other crimes, and, if so it follows that the evidence of the charges upon which the Petitioner had not yet been convicted was, in large measure, determinative. That fact would then be analogous to the situation struck down in Presnell, with Petitioner's sentence based impermissibly on other crimes, which would accordingly necessitate its reversal.

It is further submitted that certiorari is compelled in this case to consider whether the procedure below of the state's giving notice of the aggravating circumstances complies with the notice requirements of Due Process.

The disclosure below, provided a mere thirty days prior to trial, merely lists three aggravating circumstances, verbatim, from Section 565.012 RSMo. That mere listing is not sufficient notice of the evidence of the aggravating circumstances on which the state intends to rely.

The statute clearly intends that notice shall be given to the defendant, as in an information or indictment of exactly those facts in aggravation, and witnesses to support those facts, which the state will produce. Section 565.006 states, "Only such evidence in aggravation as the prosecution has made known to the Defendant prior to his trial shall be admissable." 565.006(2) RSMo.

Clearly that language intends that facts, which the state will use to support a statutory aggravating circumstance must be made available to the Defendant prior to the penalty phase, and , no such aggravating circumstance can be submitted to the jury by instruction if Defendant has not received such notice and if said evidence in not presented sufficient to convince the jury beyond a reasonable doubt. Gregg v. Georgia, supra.

The Notice contemplated by the statute would be similar to an information which is required, not merely to set out the words of the statute as to the crime charged, but to give a defendant the factual background which would bring the conduct of Defendant with that particular statutes's elements.

The notice required by the statute should be analagous to an addiditional information or pleading the state is required to file if it wishes to rely on an aggravating circumstance in seeking the death penalty.

Therefore, as the prosecution below did not present any factual basis for the aggravating circumstances disclosed to the defense, or state any witnesses or facts on which to base the circumstance and to be presented to the jury in aggravation during the penalty phase, the trial court should have properly stricken their disclosure. Allowing said disclosure to remain in the record, and issuing instruction thereon violated Petitioner's rights to Due Process in that he was unable to prepare his defense of the penalty phase, and thus the death penalty based on a jury's verdict following the above improper procedure cannot stand and would be violative of the Due Process clauses of the Fifth and Fourteenth Amendments and constitute cruel and unusual punishment under the Eighth Amendment, thus compelling the intervention of this Court to determine how specific a notice must be given before a state can present an aggravating circumstance.

As stated previously, the state was allowed in its closing argument at Petitioner's trial to argue the range of punishment contrary to Section 565.006 RSMo. The statute provides that punishment should not be considered in the guilt or innocence phase and the prosecutor's statements

to jury was in clear violation thereof. This Court should consider the extent to which a sentence of death can be imposed when the prosecutor at trial has clearly stepped beyond the bounds of evidence and argument authorized by the statute and presented the jury factors which the statute clearly prohibits it from considering. The opinion of the Missouri Supreme Court below is clearly contrary to this Court's admonition in Godfrey that Capital Murder statutes be strictly adheard to before a death sentence can be imposed.

This Court in Lockett v. Ohio, supra, enunciated an enhance standard of Due Process indicating that improperties in the state's presentation of its case which might be allowed to stand in less serious cases could not be allowed to exist where a defendant is on trial for his life.

To allow the sentence of death to stand in the light of the statute's violation clearly deprives the Petitioner of his rights to Due Process of Law and Equal Protection thereof as set forth in the Fifth and Fourteenth Amendments and the sentence of death imposed as a result of such violations is clearly cruel and unusual punishment in violation of the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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